



REPUBLIC OF KENYA

IN THE E.L.C COURT OF KENYA AT EMBU

E.L.C. 12 OF 2015

FORMERLY KERUGOYA E.L.C 40 OF 2012

MICHAEL MUGO IRERI.....PLAINTIFF

VERSUS

NELSON NTHIGA IKOU.....1st DEFENDANT

GILBERT IRERI NAMU.....2nd DEFENDANT/APPLICANT

RULING

1. By a judgement dated 9th June 2016, the Hon. Justice Boaz Olao entered judgement for the Plaintiff against the Defendants in which he granted his claim for adverse possession of Title Nos. Evurore/Nguthi/1624 and 1625. It was decreed that the Defendant's interest in the said parcels had been extinguished and that the Plaintiff be registered as proprietor.
2. Aggrieved by the said decree, the 2nd Defendant filed a Notice of Appeal communicating his intention to lodge an appeal to the Court of Appeal against the said decree of the Superior Court. The Notice of Appeal is dated 15th June 2016.
3. By a Notice of Motion dated and filed on 18th August 2016 under certificate of urgency, the 2nd Defendant applied for stay of execution purportedly under Order 1, Order 40, Order 50 of the Civil Procedure Rules, section 3A of the CPA (Cap 21), Article 159 of the Constitution of Kenya, and all other enabling provisions of the Law. The said application was based on two grounds namely; that the 2nd Defendant had filed an appeal against the said decree, and that the intended appeal shall be rendered nugatory unless stay is granted.
4. When the parties appeared before my brother Judge Hon. B.N. Olao on 30th November, 2016 they agreed to dispose of the said application by way of written submissions. The Plaintiff and the 2nd Defendant delete filed their respective submissions but the 1st Defendant had not filed any submissions as at 7th March 2017 when the court fixed the said application for ruling.
5. Although I have seen the Plaintiff's written submissions in opposition to the said application, I have not seen any replying affidavit or grounds of opposition in respect of the application. It is, however, clear from the Plaintiff's written submissions that he is opposing the application for stay primarily on legal grounds. The Plaintiff also canvasses issues which go into the merits of the intended appeal, which fall outside the province of an application for stay pending appeal.

6. It is apparent from the face of the 2nd Defendant's Notice of Motion dated 18th August 2016 that the application has been brought under the wrong provisions of the law instead of **Order 42 of the Civil Procedure Rules, 2010** which deals with appeals and stay of execution of decrees and orders. However, in view of the provisions of the **Article 159 of the Constitution of Kenya, section 19 (1) of the Environment and Land Act, 2011** and the overriding objective of the court prescribed under **sections 1A and 1B of the Civil Procedure Act (Cap 21)** the court will proceed to consider the merits of the application.

7. The main issue for consideration in this application is whether the 2nd Defendant has satisfied the requirements for the granting an order for stay of execution pending appeal under Order 42 Rule 6 of the Civil Procedure Rules. The material provisions of **Order 42 Rule b (2)** provides as follows:

"No order for stay of execution shall be made under subrule (1) unless:

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

8. The Court of Appeal of Kenya in the case of **Kenya Shell Ltd Vs Kibiru & Another [1986] KLR 410** made the following observation on the jurisdiction of the court to grant a stay of execution pending appeal:

"It is normally a good thing to see if Order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal can be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. (Per platt Ag JA).

9. Has the 2nd Defendant demonstrated the element of substantial loss in the circumstances of this case? It is evident from the decree of 9th June 2016 that the trial court found that the Defendants' title to the suit property had been extinguished by adverse possession. The court also ordered that the Plaintiff be registered as the proprietor. If the said orders were to be effected in full, then it would mean that the Plaintiff would be registered as proprietor and in the event would enjoy all the rights of a proprietor including the power to lease, charge or alienate the said properties.

10. In the event that the 2nd Defendant succeeded on appeal, it may well be unable to recover the properties. Such eventuality would result in the successful appeal being rendered nugatory. That would certainly constitute substantial loss within the meaning of Order 42 rule 6(2) of the Civil Procedure Rules. It is my opinion, and I so hold, that the 2nd Defendant has met the first requirement for granting an order of stay.

11. The second requirement relates to expedition in the filing of the application for stay. It is on record that the application for stay was filed on 18th August 2016, that is, after 2 months from the date of the judgement. The question of undue delay in the filing of such application always depends on the circumstances of each case. The said delay of 2 months has not been explained in any way by the 2nd Defendant. However, in my view, a delay of 2 months is not unreasonable in the circumstances of the suit. I therefore, consider that the application was filed without undue delay. The 2nd Defendant has therefore met the second requirement for stay of execution.

12. The third and final requirement for the grant of an order of stay relates to the provision of security for the due performance or satisfaction of the decree. From the nature of the decree made by the trial court, there is not much which may be required from the 2nd Defendant apart from an undertaking to preserve

the suit properties pending the hearing and determination of the intended appeal. Since such an undertaking is not a registrable instrument against title to land, I am of the view that the 2nd Defendant should be ordered to deposit the original title deed of Title No. Evurore/Nguthi/1625 in court for the due performance of the decree should the intended appeal fail.

13. The Plaintiff has raised some objections to the said application for stay on the basis of some alleged deficiencies in the institution of the appeal by the 2nd Defendant. It has been suggested that there is no competent appeal on account of various violations of the Court of Appeal Rules. It has been submitted that, in fact, the intended appeal is incompetent or time barred.

14. I do not think that such alleged violations would affect the competency of the instant application for stay as long as there has been filed a Notice of Appeal under the law. The 2nd Defendant may well choose to make various applications for extension of time to file or serve the various documents out of time. I shall say no more on the competency or merits of the intended appeal.

15. The upshot of the foregoing is that the 2nd Defendant's Notice of Motion dated 18th August 2016 is hereby allowed and a stay of the decree dated 9th June 2016 is issued pending the hearing and determination of the intended appeal.

16. It is further ordered that the 2nd Defendant shall deposit in court the original title deed of Evurore/Nguthi/1625 within 14 days from today to secure due performance of the decree dated 9th June 2016 should the intended appeal fail. The said title deed shall remain in court until the intended appeal is heard and determined.

17. It is further ordered that the 2nd Defendant shall move expeditiously to file his record of appeal and prosecute the appeal.

18. The costs of the application shall abide the result of the appeal.

Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th day** of **MARCH 2017**

In the presence of Mr Kathungu holding brief for Mr Okwaro for the Plaintiff/Respondent.

No appearance for Respondents.

Court clerk Njue

Y.M. ANGIMA

JUDGE

14.03.17